United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

ORIGINAL 75-7456

United States Court of Appeals
For the Second Circuit

JULIO EVANS,

Plaintiff-Appellant,

v.

CALMAR STEAMSHIP CO.,

Defendant-Appellee.

B P/S

PETITION ON BEHALF OF PLAINTIFF-APPELLANT FOR RE-HEARING AND SUGGESTION FOR RE-HEARING EN BANC

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PRELIMINARY STATEMENT

This petition is submitted by plaintiff-appellant pursuant to Rule 40 of the Federal Rules of Appellate Procedure. This petition seeks a re-hearing of the decree of this court rendered on April 16, 1976 dismissing plaintiff's appeal for lack of jurisdiction. Plaintiff, who was awarded a $60,000 jury verdict, which was conditionally reduced to $40,000 by the trial judge, attempted to accept the reduced amount under protest and to obtain review of the trial court's action on an appeal.

The basis for the requested re-hearing is for reconsideration by the entire Court of the rule denying the appealability of an order conditionally granting a new trial unless there is a remittitur. It is plaintiff-appellant's contention that where a

plaintiff accepts a remittitur under protest and waives his right to a new trial: (1) the order is final and appealable; (2) permitting the appeal is in the interest of justice; (3) it is judicially economical.

POINT I

WHERE PLAINTIFF WAIVES HIS RIGHT TO A NEW TRIAL AND ACCEPTS THE REMITTITUR UNDER PROTEST, THE ORDER IS FINAL AND APPEALABLE.

This was the holding of the Fifth Circuit in *Wiggs v. Courshon*, 485 F2d 1281 (Fifth Circuit 1973). The court reasoned that allowing the plaintiff to appeal in such circumstances did not offend the policy against piece-meal appeals, because if the remittitur was in order, the plaintiff has agreed to it, the judgment would be final and no new trial would be required. If the trial court erred in ordering the remittitur, the Appellate Court could set aside the judgment and order that a judgment be entered on the jury verdict. Again, no new trial would be necessary to conclude the litigation.[1]

POINT II

PERMITTING AN APPEAL WHERE A REMITTITUR IS ACCEPTED UNDER PROTEST IS JUST.

If one concedes the validity and justice of our system of trial by jury, based upon the premise that the collective judgment of six people is likely to be better than the judgment of a single judge, then it must also be clear that

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1. 485 F2d at 1283. See also the thoughtful discussion contained in 44 Fordham LR 845 (1976).

there is a vice in allowing the fate of a litigant to be at the mercy of unbridled discretion of a single judge, no matter how learned. The outcome of litigation should not be governed by "the luck of the draw" as to which judge presides at a trial. The most conscientious judge may yet have his judgment colored, however unconsciously, by an individual bias or prejudice. Thus, it cannot be doubted that the action of a judge in setting aside the unanimous verdict of a jury should be subject to some review.

When an order of remittitur is made there is of course a substantial risk that plaintiff may recover at a second trial a lesser verdict than was awarded to him by the first jury, or even a lesser verdict than the amount allowed him in the order of remittitur. But there is also the possibility that if he is willing to endure the agony of a new trial, that he may recover yet a larger verdict from a second jury, and if the trial is before a different judge whose thinking is different from that of the first, that such larger verdict would be permitted to stand.[2] Thus, in denying his right to a second trial plaintiff is relinquishing a valuable right. Defendant, on the other hand, really loses nothing because if the jury verdict is sustained, the plaintiff is only receiving what has been found he is entitled to.

The suggestion in the opinion of this court that the order of remittitur and the risks attendant upon a second trial are obviously calculated to induce most reasonable plaintiffs to accept the remittitur and call it a day, impliedly recognizes that a form of pressure is placed upon the plaintiff to accept less than true justice. Either the trial court has abused its

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2. c.f. *Johnson v. Lykes Brothers*, U.S. District Court for the Southern District of New York, 68 Civ. 2235, where Judge Levet set aside a jury verdict in the amount of $30,000 as being grossly excessive. At a second trial, upon the same proof, before Judge Bauman, there was a verdict for $60,000 which Judge Bauman refused to set aside.

discretion in taking away from the plaintiff part of what the jury has awarded, or it has not. If there has been no abuse of discretion, the order will be affirmed. If, on the other hand, the discretion has been abused, the verdict of the jury will be restored and both sides will be spared the expense and the hardship of a new trial.

POINT III

JUDICIAL ECONOMY DOES NOT REQUIRE ADHERENCE TO THE OLD RULE.

There can be no argument that a practice of allowing appeals from remittiturs accepted under protest saves the time of the District Court which would otherwise be required for a second trial. Argument has been made that there would be a burden upon the Court of Appeals since plaintiffs would have nothing to lose by appeal. Such an argument assumes that members of the bar of this court will prosecute upon a contingent fee basis appeals where there is little likelihood of success. A similar or stronger argument could be made that in these days of high interest rates defendants will prosecute meritless appeals from substantial plaintiffs' verdicts for no better reason than to retain the use of the money during thependency of the appeal. Furthermore, the incidence of remittiturs in the Federal Court is rare.[3] Finally, as acknowledged by this Court in *Reinertsen v. George W. Rogers Construction Corp.*, 519 F2d 531, 535, the procedure of allowing the appeal is enthusiasticly followed in the busiest circuit of all, the Fifth Circuit.

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3. The writer undertook a study by having his daughter review during the first week in May, 1976 all docket sheets in the closed docket books of the Southern District Court for the years 1973 and 1974. The choice of years was unfortunate, as not a single instance of remittitur was discovered in over 2,000 cases reviewed. This does not tell us of course whether there may have been remittiturs in cases which are still open because the plaintiff had elected a second trial.

CONCLUSION

The dismissal of the appeal in this case should be vacated and a determination rendered on the merits.

PAUL C. MATTHEWS
Attorney for Plaintiff-Appellant

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of Nov. 1975 deponent served the within - Joint App upon:

Fuller, Lawton & Meyles Esqs

attorney(s) for Applee

in this action, at 17 Battery Pl
NYC 10004

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Robert Bailey

Sworn to before me, this 24
day of Nov. 1975.

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976